Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term 1997

JOAN M. CANFIELD

Petitioner,

v.

VAN ATTA BUICK/GMC TRUCK, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

PETER P. CHARNETSKY*
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APPELLATE ADVANTAGE
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36 pp

QUESTION PRESENTED

Is a civil litigant entitled to post-judgment relief pursuant to Federal Rule of Civil Procedure 60(b)(6) when post-judgment evidence indicates that the litigant was denied its due process right to a fair trial because the law office, at the time, was administratively late in filing its brief.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were the Petitioner, Joan M. Canfield, and the respondent, VanAtta Buick/GMC Truck, Inc., a New York Corporation.

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Petitioner, Joan Canfield, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Unites States Court of Appeals for the Second Circuit No. 408, August Term, 1997, can be found in Appendix A.

The opinion of the district court in Canfield v. VanAtta , Docket No. 97-7251 can be found in Appendix B.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

Federal Rule of Civil Procedure 60(b)(6) provides:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representatives from a final judgment, order, or proceeding for the following reasons: (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The fundamental question in this case is whether a litigant is entitled to relief from a judgment if the district court and the circuit court denied the litigant due process under the law to be heard because of administrative errors from the law office.

Petitioner is a former employee of the Respondent, an automobile dealership. She performed clerical work for the parts department and repair shop.

Petitioner commenced this action against the Respondent alleging that Petitioner was wrongfully terminated, that the Respondent subjected the Petitioner to sexual harassment and the Respondent discriminated against the Petitioner pursuant to the Human Rights Law of the State of New York.

On September 24, 1996, Respondent served Petitioner a motion for Summary Judgment. The Respondent also served a letter stating responsive papers must be forwarded to the Respondent within twenty-one (21) days.

On November 14, 1996, the Petitioner filed its Memorandum of Law in opposition to the Respondent's motion for Summary Judgment. On November 16, 1996, the Court granted the Respondent's motion for Summary Judgment. On November 29, 1996, the Petitioner filed a motion for reconsideration of the Court's order granting the Summary Judgment. The Court denied this motion on December 30, 1996.

On January 16, 1997, the Petitioner filed a Notice of Appeal. On October 3, 1997, the United States Court of Appeals for the Second Circuit affirmed the District Court's decision for summary judgment.

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT.

Ms. Canfield's petition for writ of certiorari should be granted because the opinion below conflicts with this Court's important prior rulings on a litigant's fundamental due process right to a fair trial.

The Petitioner, through its Memorandum of Law, established several issues of material fact which still existed at the time the motion for summary judgment was filed. However, the Court refused to review this pleading because of its late filing although the Court had not yet granted the Defendant's request for summary judgment. However, though the Petitioner filed a pleading in opposition to the Respondent's motion, the Court still determined the Petitioner consented to the requested relief because the filing was not timely. This decision was pursuant to General Order #41.

In Jackson v. New York, 22 F.3d 71 (1994), the District Court dismissed the Petitioner's complaint for failure to comply with a Court Order. On appeal the Court of Appeals, Second Circuit, the Court vacated the lower Court's order. In Jackson the Court held that dismissing a complaint for failure to comply with a Court order is a harsh remedy which should be used only in extreme situations.

In the case at bar, the Petitioner filed its responses as directed, but did not do so in a timely manner. A less severe sanction would have been to adjourn the hearing date to the next motion calendar thereby allowing the Respondent adequate time to respond. This would have allowed the lower court to review all the pleadings to determine if any material issues existed. However, the lower court strictly enforced the requirements set forth in General Order #41. Therefore, no opposition pleadings were reviewed by the lower court.

In the Petitioner's motion for reconsideration, counsel for the Petitioner set forth reasons why the responding papers were not filed in a timely manner. Citing McDermott v. Lehman, 594 F.Supp. 1315 (1994) and Lepkowski v. United States Department of the Treasury, et al, 804 F.2d 1310 (1986), as precedent, the Petitioner argued that the failure to respond in a timely manner was excusable neglect. Therefore, the lower court should have vacated the prior order and determined the issues on their merits. Failure to do so was an error by the lower court. Since the lower court did not vacate the order, the Second Circuit should have referred the case back to the District Court so that the Petitioner's case could be heard.

In the case Pioneer Investment Services Co. V. Brunswick Associates, LTD. Partnership, 507 U.S. 380 (1993), the determination was whether granting the delay would prejudice the debtor; the length of the delay and its impact on efficient court administration; whether the delay was beyond the reasonable control of the person whose duty

it was to perform; whether the creditor acted in good faith; and whether clients should be penalized for their counsel's mistake or neglect. As to the case at bar, the Respondent would not be prejudiced since an extension for responding could be granted. The length of the delay did not impact the court's efficient administration since the court granted the summary judgment after receiving the Petitioner's memorandum of law. The Petitioner and her counsel acted in good faith. The delay was beyond the reasonable control of the law office due to the complexity and time-frame required for a state assembly election. Therefore, the Petitioner should not be penalized for the mistake or neglect of the law office to file the memorandum sixteen days earlier.

CONCLUSION

If the opinion below is allowed to stand, the litigant will be denied due process. By granting the petition for certiorari, this Court can correct the second circuit's decision, which defies this Court's long-standing position that a litigant has a due process right to be heard, and that Rule 60(b)(6) can be used to effectuate this right. In so doing, this Court can also reaffirm the important role played by the district judge as a trier and finder of fact.

Accordingly, the Petitioner respectfully request that her petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 408 August Term, 1997

(Submitted: September 25, 1997

Decided: October 3, 1997)

Docket No. 97-7251

JOAN M. CANFIELD,

Plaintiff-Appellant,

v.

VAN ATTA BUICK/GMC TRUCK, INC.,

Defendant-Appellee.

Before:

MESKILL and CALABRESI, *Circuit Judges*, and BRIEANT, *District Judge.*[*]

Appeal from an order of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *J.*), denying plaintiff's Rule 60(b) motion to vacate dismissal on the ground of excusable neglect.

Affirmed.

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[*]The Honorable Charles L. Brieant, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

PETER P. CHARNETSKY, Binghamton, NY,

for Plaintiff-Appellant.

MARGARET J. FOWLER, Chernin & Gold, LLP, Binghamton, NY,

for Defendant-Appellee.

PER CURIAM:

Appellant sought relief under Federal Rule of Civil Procedure 60(b), for failure to comply with a filing deadline, from the district court's dismissal of her employment discrimination action. We conclude that, in finding that her error was not excusable neglect, the district court properly considered all relevant circumstances surrounding her failure to adhere to the court rules. Hence, we affirm.

I. Background

Appellant Joan Canfield filed this action under Title VII of the Civil Rights Act, 28 U.S.C. §§ 2000, *et seq.*, and the New York Human Rights Law, N.Y. Exec. Law § 296. In it, she alleged employment discrimination, sexual harassment, and wrongful termination. On September 24, 1996, the defendant served on Canfield's attorney a motion for summary judgment pursuant to Amended General Order #41 ("G.O. #41") of the United States District Court for the Northern District of New York. In a cover letter accompanying that motion, the defendant accurately described the duty G.O. #41 imposed on Canfield:

> General Order #41 requires that dispositive motion papers be served 35 days before filing, without a return date. The date will be assigned when the papers are filed with the court on October 30, 1996.

> Original responsive papers, with one copy, must be forwarded to the undersigned within 21 days.

G.O. #41 permits extensions of the time limit if the parties so agree, but absolutely requires compliance with the 21-day rule absent such agreement. It also states, in boldface, capital letters, that:

> **ANY PARTY THAT FAILS TO TIMELY SUBMIT RESPONSIVE PAPERS PURSUANT TO THE TERMS OF THIS AMENDED GENERAL ORDER SHALL, UNLESS GOOD CAUSE IS SHOWN, BE DEEMED TO HAVE CONSENTED TO THE RELIEF SOUGHT BY THE OTHER PARTY/PARTIES.**

Canfield failed to forward the required "responsive papers" to the defendant.

On October 30, the defendant filed its summary judgment motion anyway, as it was entitled to do under the local rules. Finally, on November 14, Canfield filed a Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. One week later, the district court ordered her complaint dismissed with prejudice. In its order, the court explained that Canfield had not complied with G.O. #41, nor had she shown good cause or exceptional circumstances justifying her failure to do so. The court therefore deemed her to have consented to the dismissal of her claims.

Canfield then filed a Rule 60(b) motion requesting that the district court vacate the order of dismissal. In his supporting affidavit, Canfield's attorney stated that the failure to comply with G.O. #41 was not his client's fault, but his own. He offered two explanations for his error. First, he said that, during the relevant period, he was "heavily involved in [his] bid for the 124th Assembly District in New York State." Second, he stated that, "due to an administrative oversight the papers were [put in the office file] pending a Court date," and "[c]ounsel mistakenly believed responsive pleadings were not due until a return date for the motion was set." On the basis of those facts, counsel argued that the dismissal should be vacated because his failure to comply with G.O. #41 was a matter of "excusable neglect" and did not detract from the merits of Canfield's claims.

On December 30, the district court denied Rule 60(b) relief. In its order, the court noted the reasons Canfield's attorney offered for his error. It also specifically listed some of the other circumstances it considered in reaching its conclusion. Those circumstances included the facts: (1) that the defendants had notified Canfield of the requirements of G.O. #41; (2) that G.O. #41 expressly provides that a return date for a summary judgment motion will not be selected until the motion is fully briefed and ready for filing; and (3) that G.O. #41 includes the boldface, capitalized language reproduced above.

Canfield now appeals the order denying her Rule

60(b) motion.

II. Discussion

We review the district court's denial of a Rule 60(b) motion for an abuse of discretion. *Kotlicky v. United States Fidelity & Guar. Co.*, 817 F.2d 6, 8 (2d Cir. 1987).

Prior to the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), we adhered to a firm rule that "[t]he excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules." *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 515 (2d Cir. 1985) (rejecting a claim of excusable neglect under Fed. R. App. P. 4(a)(5)). And that rule applied with equal force to a party's failure to comply with a local rule of court. *See, e.g., Wakefield v. Northern Telecom, Inc.*, 813 F.2d 535, 542 (2d Cir. 1987).

In *Pioneer*, however, the Supreme Court "established a more liberal standard for determining whether there had been 'excusable neglect.'" *United States v. Hooper*, 43 F.3d 26, 28 (2d Cir. 1994). Although *Pioneer* interpreted "excusable neglect" in the context of Bankruptcy Rule 9006(b)(1), the Court analyzed that term as it is used in a variety of federal rules, including Rule 60(b)(1). *See* 507 U.S. at 393-94. For that reason, we have held that *Pioneer*'s more liberal definition of excusable neglect is applicable

"beyond the bankruptcy context where it arose." *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994) (applying definition to Fed. R. App. P. 4(a)(5)); *see also United States v. Hooper*, 9 F.3d 257, 259 (2d Cir. 1993) (*Pioneer* "draws upon the use of ['excusable neglect'] in other federal rules," and "nothing . . . limits its interpretation . . . to the Bankruptcy Rules.").

The Supreme Court in *Pioneer* explained that the term "neglect," for purposes of interpreting "excusable neglect" in the federal rules, has its normal, expected meaning: inadvertence, carelessness, and mistake. *See* 507 U.S. at 388. It then reasoned,

> [a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 6(b) is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant.

507 U.S. at 392 (footnote omitted). The Court explicitly stated that, "at least for purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394.

In light of its interpretation of "neglect" as "negligence," the Court noted that the "excusable" portion of

"excusable neglect" must provide the limitations necessary to prevent abuse by the parties. "[T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395.

In short, per se rules like the one in *Cosmopolitan Aviation* do not perdure after *Pioneer*. *See Hooper*, 43 F.3d at 28 (noting that *Pioneer* overruled this circuit's prior "excusable neglect" standard under Fed. R. App. P. 4(b)); *see also Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 (9th Cir. 1997). As one court explained it, *Pioneer* "noted that 'inadvertence, ignorance of the rules, or mistakes construing the rules do not *usually* constitute 'excusable neglect.' Thus, although a late filing will ordinarily not be excused by negligence, that possibility is by no means foreclosed." *Id.* (quoting *Pioneer*, 507 U.S. at 392 (emphasis added)) (footnote omitted). In accordance with that holding, a finding that the failure to comply with a filing deadline was excusable may in some circumstances be appropriate. For example, neglect may be excusable where the language of a rule is ambiguous or susceptible to multiple interpretations, or where an apparent conflict exists between two rules. Other grounds may exist, but we need not canvass them today. *See generally Pioneer*, 507 U.S. at 395 (listing some factors relevant to an equitable determination of excusable neglect).

But we do not believe that the possibility that a court may properly find excusable neglect on such grounds alters the principle that failure to follow the clear dictates of a court

rule will generally not constitute such excusable neglect. We are not alone in that view. *See, e.g.*, *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931-32 (9th Cir. 1994) (holding that, where counsel failed to offer a persuasive justification for failing to comply with Fed. R. Civ. P. 6(e) and local court rules, there was "no basis for deviating from the general rule that a mistake of law does not constitute excusable neglect"). And, we have not hesitated to reiterate the old rule at the same time that we have applied *Pioneer*'s equitable test in determining whether failure to comply with a filing deadline constituted excusable neglect. *See, e.g.*, *Weinstock*, 16 F.3d at 503 (quoting *Cosmopolitan Aviation*'s statement of the pre-*Pioneer* automatic rule, but then engaging in an "equitable determination" taking into account "all relevant factors"). Where, as in *Weinstock*, the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test.

For this reason, we conclude that the district court did not abuse its discretion in determining that a finding of excusable neglect was unwarranted here. Indeed, it is hard to imagine any other result following from the facts of this case. As the district court noted, the language of G.O. #41 is unambiguous. Under that language, Canfield was required to respond to the defendant's summary judgment motion within 21 days, and her failure to do so was expressly described as consent to the dismissal of her claims, absent a showing of good cause. Moreover, the cover letter accompanying the

summary judgment motion clearly and accurately restated the pertinent requirements of the rule. Counsel's failure to read and obey an unambiguous court rule -- especially when the opposing party told him what the rule said -- was not excusable. And the fact that counsel was preoccupied with his bid for public office does not alter this conclusion. The district court properly took into account these and all other relevant circumstances, and its granting of dismissal with prejudice was entirely proper.

The judgment of the district court is affirmed.

FOR THE COURT:

/s/ Lucille Carr

GEORGE LANGE III, Clerk

by: Lucille Carr, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of October, one thousand nine hundred and ninety-seven.

PRESENT: HON. Thomas J. Meskill
HON. Guido Calabresi
Circuit Judges
HON. Charles L.Brieant
District Judge**

Docket No: 97-7251

JOAN M. CANFIELD,

Plaintiff-Appellant,

V.

VAN ATTA BUICK/GMC TRUCK, INC.,

**The Honorable Charles L. Brieant, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

Defendant-Appellee.

Appeal from United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, **ADJUDGED, and DECREED** that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk
By:
/s/ Beth J. Meador
Beth J.Meador
Administrative Attorney

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOAN CANFIELD

Plaintiff,

-against-

VAN ATTA BUICK/GMC TRUCK, INC., a New York I Corporation,

Defendant.

DECISION & ORDER

I. BACKGROUND

Currently before the court are: (1) the plaintiffs motion to vacate the Courts November 21, 1996 Order pursuant to Fed. R. Civ. P. 60(b)(1); and (2) the defendant's motion for discovery costs pursuant to *28 U.S.C. §§ 1920 & 1924* and Fed. R. Civ. P. 54(d).

In an Order dated November 16, 1996, and filed on November 21, 1996, the Court granted the defendant's motion for summary judgment, dismissing the plaintiff s Complaint, for failure of the plaintiff to file timely responsive papers to the motion. The motion was governed by Second Amended General Order 41 ("G.O. 41 "). The moving papers were served on the plaintiffs attorney, Mr. Charnetsky, on or about

September 24, 1996. Pursuant to G.O. 41 and as stated in the defendant's cover letter, the deadline for serving responsive papers was twenty one (21) days from service of the defendant's papers. Thus, the plaintiff's responsive papers were to be served on the defendant no later than October 15, 1996. However, no responsive papers were served until November 14, 1996, one month late. The Court granted the defendant's motion on November 16, 1996.

The plaintiff argues that the Court should vacate its November Order, because "there are extenuating circumstances which resulted in the law office failure" to timely file responsive papers. The plaintiffs attorney explains that the extenuating circumstance to which he refers is his involvement in running for the 124th Assembly District seat. When the defendant's papers were served on the plaintiff's attorney he saw that no return date was set, and thus, he did not respond, preferring to wait for a date to be assigned by the Court.

The defendant argues that the plaintiff's explanation does not rise to the level required for a Court to vacate a judgment pursuant to Fed. R. Civ. P. 60(b)(1).

As to the motion for costs, the plaintiff has not submitted responsive papers.

II. DISCUSSION

A. Vacating a Judgment Pursuant to Fed. R. Civ. P. 60(b)(1)

Pursuant to Fed. R. Civ. P. 60 (b)(1), "the Court may relieve a party ... from a final judgment, order, or proceeding for ... excusable neglect." The Court notes, however, that "[s]ince 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986). In exercising its discretion as to whether to grant a 60(b)(1) motion, the Court "should balance the policy in favor of serving the ends of justice against the policy in favor of finality." Mazzone v. Stamler, 157 F.R.D. 212, 214 (S.D.N.Y. 1994), citing Nemaizer, 793 F.2d at 61; 11 C. Wright & A. Miller, Federal Practice ad Procedure § 2857 (1973 & Supp. 1993).

Significantly, "ignorance of the procedural rules governing actions in federal court" has been held insufficient to constitute excusable neglect. See Long v. Carberry 151 F.R.D. 240, 243 (S.D.N.Y. 1993). In Long, an attorney failed to seek an extension of time to respond to a motion to dismiss. Id. This failure was attributed to the illness of the plaintiff and the plaintiff's attorney's wife. Id. The Court stated that "if plaintiff required additional time to respond to defendants' motion to dismiss, he should have employed the proper procedure which would have been to [seek] an extension of time." Id.

In the present case, the plaintiffs attorney was notified by cover letter at the time the original moving papers were served that he had twenty-one (2 1) days in which to respond

to the defendant's motion. See Tanenhaus, Esq. Aff. at ¶4. Moreover, G.O. 41 expressly states "[i]f the opposition papers cannot be prepared and served on the moving party within a twenty-one day period ... the parties may agree to a reasonable extension of time in which to serve opposition papers. If the parties cannot so agree, then the opposition papers *SHALL* be prepared and served ... within a twenty-one day period." G.O. 41 also expressly provides that a return date is not selected until "the motion has been fully briefed ... and is ready for filing with the Court." Finally, G.O. 41 states in bold capital letters:

> **ANY PARTY THAT FAILS TO TIMELY SUBMIT RESPONSIVE PAPERS PURSUANT TO THE TERMS OF THIS AMENDED GENERAL ORDER SHALL, UNLESS GOOD CAUSE IS SHOWN, BE DEEMED TO HAVE CONSENTED TO THE RELIEF SOUGHT BY THE OTHER PARTY/PARTIES.**

The reason given by the plaintiffs attorney for the failure of the plaintiff to respond to the defendant's motion does not constitute good cause, much less extraordinary circumstances such that the Court can find excusable neglect. The Court interprets the failure to respond, particularly when expressly informed of the time frame within which to respond, as either a tactical decision, or ignorance of the law. Neither will suffice to show excusable neglect. See Long, supra at 243. Accordingly, the Court will DENY the plaintiff

s Fed. R. Civ. P. 60(b)(1) motion.

B. Motion for Costs

The defendant has moved before this Court for certain costs for transcription costs in the amount of $210.30 associated with the deposition of the plaintiff Joan Canfield. The plaintiff has not opposed this motion. Accordingly, the defendant's motion is GRANTED.

III. CONCLUSION

For the reasons stated herein, the Court DENIES the plaintiffs Fed. R. Civ. P. 60 (b)(1) motion to vacate the Court's November Order granting the defendant's motion for summary judgment, and further GRANTS the defendant's motion for costs associated with the deposition of the plaintiff.

IT IS SO ORDERED.

Dated: December 28,1996
at Binghamton, New York

/s/ Thomas J. McAvoy
Thomas J. McAvoy
Chief U.S. District Judge

United States District Court

NORTHERN DISTRICT OF NEW YORK

JOAN CANFIELD,

Plaintiff

JUDGMENT IN A CIVIL CASE

V.

VAN ATTA BUICK/GMC TRUCK, INC.,
A New York Corporation,

Defendant.

CASE NUMBER: 95-CV-1684

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been vied and the jury has rendered its verdict.

■ **Decision by Court** This action came to trial or hearing before the Court- The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the Court hereby DEEMS the plaintiff to have consented to the relief sought in the defendant Van Atta's motion, and further ORDERS that the plaintiff's complaint be DISMISSED, in its entirety, with prejudice, as against the defendant Van Atta, in accordance with Order dated 11/16/96 and signed by Chief Judge Thomas J. McAvoy.

11/21/96 /s/ George A. Roy

Date Clerk

/s/ J. Leonard

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOAN CANFIELD,

Plaintiff,

-against- 95-CV--1684

VAN ATTA BUICK/GMC TRUCK INC., a New York Corporation,

Defendant.

Thomas J. McAvoy, Chief U.S.D.J.

ORDER

This matter having come before the Court on the defendant Van Atta's motion for summary judgment pursuant to Fed. R. Civ. P. 56, seeking dismissal of the Complaint, the motion being governed by Amended General Order 41 ("G.O. 41"), which states, in relevant part, "[a] party that fails to timely submit responsive papers pursuant to [G.O. 4 1] ... shall, unless good cause is shown, be deemed to have consented to the relief sought by the other party/parties," and the defendant Van Atta having sought responsive papers from the plaintiff pursuant to the terms of G.O. 4 1, by letter dated September 24, 1996, and no response having been submitted and no cause having been shown, the Court hereby

DEEMS the plaintiff to have consented to the relief sought in the defendant Van Atta's motion and further

ORDERS that the plaintiff's complaint be DISMISSED, in its entirety, with prejudice, as against the defendant Van Atta.

IT IS SO ORDERED.

Dated Nov. 16, 1996
at Binghamton, New York

/s/ Thomas J. McAvoy
Thomas J. Mc Avoy
Chief U.S. District Judge